81271-3

NO. 253163-III
(Consolidated with No. 253171)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CITY OF SPOKANE,

Respondent,

v.

LAWRENCE J. ROTHWELL
And
HENRY E. SMITH,

Petitioners.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Election laws are designed to ensure that the citizens' voices are heard. Despite some arguable technical deficiencies, it cannot be disputed that the citizens of Spokane elected the judge who presided over the Petitioner's trial.[1] Their voice was heard. Although the Spokane County citizens also voted in the election, their participation did not thwart the will of the municipal electorate. Even if persuaded that Petitioner's argument with respect to the statutory deficiencies is technically correct, an appellate court should not thwart the voters' voice by invalidating election results when the results would have been the same. There has been substantial compliance with the creation of the municipal department and the election of the judicial officer who presided below. This Court should affirm.

II. ASSIGNMENT OF ERROR/ ISSUE REGARDING ASSIGNMENT OF ERROR

Although the Petitioners list several assignments of error, they all really ask the same question, which is: Does a municipal judge who was elected by a majority of the municipal voters court have jurisdiction over the Petitioners? The answer is yes. This Court has recognized that

[1] As noted in Petitioner's Opening Brief, Judge Walker presided over Mr. Smith's trial and that same judicial department presided over Mr. Rothwell's trial. OPENING BRIEF at p. 3. Petitioners raise the same issue irrespective of the judicial officer.

substantial compliance is sufficient. Moreover, *de facto* jurisdiction exists until an elected official is displaced through a *quo warranto* proceeding. This Court should affirm.

III. STATEMENT OF THE CASE

At the time Petitioners filed their brief, the City of Spokane still operated as a Municipal Department of the Spokane County District Court pursuant to RCW 3.46; this is no longer the case.[2]

IV. ARGUMENT

An elected judiciary from the constituents they serve is critical. It insures the independence of the bench and preserves power to the people – bedrock principles to the justice system in this State.[3] Here, the City presented evidence that the people **were** a part of the process. Irrespective of how the ballot was labeled, the municipal precincts reflect the same results for the sole contested position: Municipal voters elected Judge Walker. It is not a situation in which the municipal voters' will was thwarted by having County residents also participate in the election of judges who serve on the municipal bench.

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[2] *See City of Spokane v. County of Spokane,* 158 Wn.2d 661, 146 P.3d 893 (Nov. 16, 2006).

[7] *See In Re Judicial Discipline of Hammerstein*, 139 Wn.2d 211, 249, 985 P.2d 924 (1999)(J. Talmadge, *concurring*); GR 29; *Municipal Courts, Judicial Independence, and the Board for Judicial Administration*, 18 WASH. ST. BAR NEWS, Oct. 2002; THE WALSH REPORT: THE PEOPLE SHALL JUDGE (1996).

Moreover, the electorate's ability to participate in the selection of the judicial officers distinguishes this case from the authority upon which the Petitioners rely. In *State v. Moore,*[4] several Petitioners challenged a district court **commissioner's** authority to issue search warrants based on a similar challenge. The key fact and basis for the *Moore* court's decision rests with the fact citizens have no voice or vote on who fills this unelected position.

The *Moore* Court recognized how district court commissioners wield substantial authority, and *the position is appointed and not subject to election.* Therefore, '[t]he power of the office makes it essential that the County properly and publicly create and authorize it.' *Id.* at 814. The court noted that once the office is created, the people have little influence over the commissioner. Hence, the court concluded that establishing the office at a public hearing failed to give notice to anyone who was not present at the hearing, and thus denied residents an opportunity to be heard on the use of the commissioners. *Id.*

Applying the facts in *Moore* to this case, we are comparing apples and oranges. While it is true that commissioners and judges perform similar functions in our courts, the road traveled in order to ascend to the bench is markedly different: Simply put, judges are elected by the voters

[4] 73 Wn. App. 805, 871 P.2d 1086 (1994).

while commissioners are not. And the critical fact here is that Judge Walker was duly elected by the citizens of the City of Spokane; her court had jurisdiction to hear this case.

The Petitioners appear to recognize that all District Court departments are technically considered to be municipal departments, but argue that the internal rotation among those positions without the input of municipal voters and adequate notice to the voting public. OPENING BRIEF, pp. 7-8. This argument misses the mark.

Here, the voters had their input: Municipal voters elected the same judges in all the departments, each of which has been denominated as a municipal department. Arguably, this allows for flexibility to serve the needs of the municipal court. As the Washington Supreme Court recently recognized, GR 29 vests the Presiding Judge with the responsibility of managing the cases, and allocating resources to maximize the court's ability to adjudicate cases.[5] Allowing the Presiding Judge to allocate resources by assigning the elected judges is consistent with this concept, and does not eviscerate the will of electorate.

Unlike *Moore*, here, the voters had an opportunity to cast their votes and did so. There has been substantial compliance with the challenged laws, thereby giving the Municipal Court jurisdiction. This

[5] *City of Spokane v. County of Spokane*, 158 Wn.2d at ¶ 24 (quoting GR 29(e)).

not withstanding, at the very least, its elected judges hold color of title to their position and they are *de facto* officers. Accordingly, their actions are valid, despite the alleged defects, until the challenged judge is displaced by a *quo warranto* proceeding. On these bases alone, the Petitioners' challenges must be denied.

1. The City has substantially complied with the law.

The Petitioners argues that the Districting Plan for the municipal court does not strictly comply with various statutory mandates, and that the municipal judges must be elected only by the voters of the municipality. They argue that strict compliance with statutory requirements is necessary in order to properly create the municipal court and have individual judges serve in those departments. However, strict compliance is not required in this case and the evidence shows that the municipal voters selected the judges subject to this challenge. Because there has been substantial compliance, jurisdiction exists.

Moreover, this Court already noted in *State v. Amodio,*[6] there were "sound policy reasons" for the *dicta* in *Moore* that required strict compliance with RCW 3.38.020 because it recognized, as previously discussed, that district court commissioners wield substantial authority

[6] 110 Wn. App. 359, 364, 40 P.3d 1182, *rev. denied* 147 Wn.2d 1011 (2002).

without direct accountability to the county's residents.[7] In *Amodio*, however, this Court held that despite Spokane County's Districting Plan originally failing to comply with the statute, the policy reasons for strict compliance for non-elected commissioners, including accountability to the public, were satisfied. The same situation exists here.

Again, as noted in *Moore*,[8] public input into the creation of the office of district court commissioner is the paramount concern of the Legislature. In the cases here, the process of resolutions, public discussion, adoption and amendment of the [Spokane] county code has provided the public adequate opportunity to be heard on the authorization for the office of district court commissioner. . . .[9] This rationale likewise exists in this case.

2. <u>The preceding arguments notwithstanding, Washington case law universally recognizes that judicial officers, even if not elected, have authority to act in a de facto capacity</u>.

In *In Re Eng*,[10] the problematic position involved a judge *pro tem*. Under Seattle's district court enabling statute (RCW ch. 35.20), which is different from Spokane, those judicial officers could only be appointed

[7] *Amodio*, 110 Wn. App. at 364 (citing *Moore*, 73 Wn. App. at 813).
[8] *Moore*, 73 Wn. App. at 814.
[9] *Id.* at 365.
[10] 113 Wn.2d 178, 192-93, 776 P.2d 1336 (1989).

by the mayor.[11] Given that the "judge" of that department was not accountable to the public by the elective process, the Court concluded that Seattle did not validly create that department: Using the permanent *pro tem* in addition to the regular departments – as opposed to use in addition to regular judges – allowed that judge to act as a separate department that was beyond the scope of the enabling statute.[12] Despite this lack of jurisdiction, the Court affirmed Mr. Eng's conviction because the court had de facto authority over him.[13]

Washington recognizes how: "Where the office is created by legislative act or municipal ordinance . . . the general rule yields and the office is regarded as a de facto office until the act or ordinance is declared invalid."[14] Our courts in *State v. Britton*[15] noted how:

> *"An officer de facto,"* said Storrs, J., "*is one who exercises duties of an office under color of an appointment or election to that office.* . . . The distinction, then, which the law recognizes, is that an officer *de jure* is one who has the lawful right or title, without the possession, of the office, while an officer *de facto* has the possession, and performs the duties under the color of right, without being actually qualified in law so to act, both being

[11] *Id.*
[12] *Id.* at 194.
[13] *Id.*
[14] *State ex rel. Farmer v. Edmonds Mun. Ct.*, 27 Wn. App. 762, 768, 621 P.2d 171 (1980), *rev. denied* 95 Wn.2d 1016 (1981).
[15] 27 Wn.2d 336, 178 P.2d 341, 346 ( ).

> distinguished from a mere usurper, who has neither lawful title nor color of right."[16]

In *Britton*, the appellant sought to have his conviction overturned on the ground that the trial court had not been lawfully appointed. The Supreme Court rejected his challenge, concluding that the trial judge was at least a *de facto* officer, who must be submitted to until displaced by a regular direct proceeding for that purpose. The proper and exclusive method for determining the right to a public office is a *quo warranto* proceeding.[17] The same exists here: At a minimum, the challenged judges are *de facto* officers absent a successful *quo warranto* proceeding.

Moreover, In *Nollette v. Christianson*,[18] then-judge Nollette argued that all Spokane County District Court judges constitute a single municipal department in which all the judges have jurisdiction to hear Spokane Municipal Court cases. The problem with his argument, as the Supreme Court noted, was how the Spokane County Code 1.16.050 expressly stated that all of those judges shall function as "part-time" municipal judges.[19] It summarized:

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[16] *Id.* (citation omitted, italics in original).
[17] *See, e.g., State v. Franks*, 7 Wn. App. 594, 596, 501 P.2d 622 (1972); *Barrett-Smith v. Barrett-Smith*, 110 Wn. App. 87, 91, 38 P.3d 1030 (2002). [N.B., *Quo warranto* proceedings are not limited to conflicting claims to a public office. *Green Mtn. Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 159, 351 P.2d 525 (1960)(citing cases).]
[18] 115 Wn.2d 594, 800 P.2d 359 (1990).
[19] *Id.* at 602-03.

> Consequently, under the statutory scheme, SCC § 1.16.050 establishes the relevant pool of judges who are eligible to serve as part-time municipal court judges. RCW 3.46.060, however, provides the mechanism for the city to select the part-time municipal judges from the eligible pool.[20]

After the *Nollette* decision, Spokane County amended SCC 1.16.050 to say that all of the judges function as municipal judges; *i.e.,* it deleted the part-time limitation. In addition, the Legislature amended RCW 3.46.063 after the *Nollette* decision.

Prior to enacting RCW 3.46.063, the City of Spokane had the option of selecting its municipal judges by election or appointment.[21] Although the legislative amendments are not a model of clarity because it states how "[n]otwithstanding RCW 3.46.050 and 3.46.060," full-time municipal judges must be elected. Here, all of the challenged judges were elected. Further, City residents who voted elected the challenged judges. Accordingly, there was substantial compliance.

Strict compliance with legislatively mandated procedures is not always required. Indeed, Washington courts have long upheld actions taken in substantial compliance with statutory requirements, albeit with

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[20] *Id.* at 605.

[21] Appointment processes for municipal judges are set forth in RCW 3.46.050 (full-time), .060 (part-time).

procedural imperfections.[22] Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of [the] statute."[23]

Here, the purpose of the legislative amendments was to have voters elect the judges. There has been substantial compliance: The voters of the City of Spokane elected the judges who currently sit on the Municipal Court. The municipal precinct results mirror the County-wide results. Even if there had not been technical compliance by failing to identify the assigned municipal department on the ballot, there is no difference in result. Moreover, with the post-*Nollette* amendments to SMC 1.16.050, one may argue that all of the judges of the District Court – all of whom were elected by the by voters of the City – are eligible to be assigned to the Municipal Department.

Lastly, this Court may affirm on any grounds supported by the record.[24] The trial judge set forth a slightly differing rationale in her July 27, 2005 MEMORANDUM OPINION DENYING DEFENDANT'S MOTION TO

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[22] *Continental Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 603, 910 P.2d 1284 (1996).
[23] *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991).
[24] *State v. Bryant*, 97 Wn. App. 479, 490-91, 983 P.2d 1181 (1999), *rev. denied*, 140 Wn.2d 1026, *cert. denied* 531 U.S. 1016 (2000).

DISMISS, [25] which claims that there had been strict compliance with the election statutes.

V. CONCLUSION

The lower court had jurisdiction to hear this case. Not only was Judge Walker duly elected by the citizens of Spokane, there has been substantial compliance with the election laws and the creation of the Municipal Department. Any contrary result would thwart the voice of the electorate -- something Washington law vigorously protects. Moreover, the judge at a minimum has *de facto* authority until removed by a *quo warranto* proceeding, which has not occurred.

The City respectfully asks this Court to affirm the lower courts.

Respectfully submitted this 2nd day of February, 2007.

THE CITY OF SPOKANE

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[25]Pursuant to RAP 9.1(e), this is a part of the RALJ record, which is not amenable to traditional CP designations. It was appended to Petitioners' Motion for Discretionary Review at Bates No. 000079-90.

CERTIFICATE OF SERVICE

I, Michelle D. Szambelan, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct. I served a copy of the Respondent's Brief by hand-delivering on February 2, 2007 three copies (1 for counsel, 2 for each of the Petitioners in care of counsel) of the foregoing pleading to opposing counsel's address of record:

Mr. Breean L. Beggs
Center for Justice
35 W. Main Street, Ste. 300
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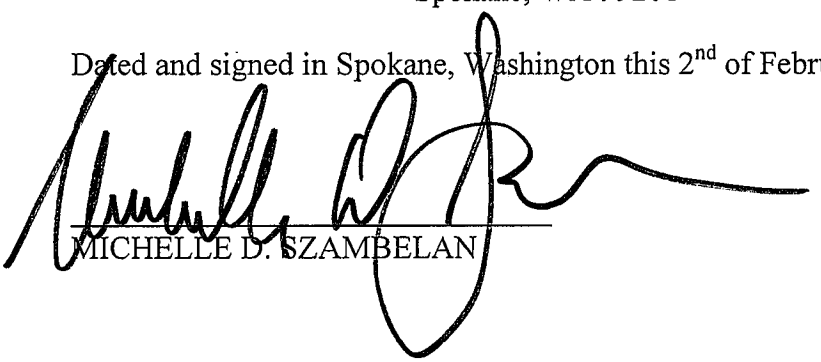
Dated and signed in Spokane, Washington this 2nd of February, 2007.



MICHELLE D. SZAMBELAN